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ABSTRACT

The history of copyright legislation is traced from 1476 to 1984, with particular emphasis on the copyright of such nonprint material as computer software and programs, sound recordings, and videorecordings. A review of the history covers the Statute of Anne (1710) and English common law through the various Copyright Acts of the United States government. A discussion of computer software and programs examines the issue of whether copyright law is more applicable to computer programs than protection by patent law or protection through the trade secret law. The concept of fair use--an exception to the rule that copyright enjoins one person from making copies of the works of another--is also explained. Several cases are cited to demonstrate the continuity of purpose of copyright law, including Data Cash Systems, Inc., versus J.S. & A. Group, Inc. (1980), involving the computer game Compuchess; White-Smith Music Company vs. Apollo Corporation (1908); The Encyclopaedia Britannica Educational Corporation versus Crooks (1982); and Universal City Studios, Inc., versus SONY Corporation of America (1984). Twenty-five references are cited in the footnotes. (Author/LMM)

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History of Copyright of Selected Non-print Material

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I. ABSTRACT

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

The history of copyright legislation is traced from 1476 to 1984 with particular emphasis on the copyright of such non-print material as computer software and programs, sound recordings, and videorecordings. Several illustrative cases are cited to demonstrate the continuity of purpose of copyright law.

II. HISTORY

Copyright is defined as "the exclusive right to print, reprint, publish, copy and sell books, periodicals, newspapers, dramatic and musical compositions, lectures, works of art, photographs, pictorial illustrations, and motion pictures, for the period of the author's life plus an additional fifty years."<1> It extends from books, maps, and charts orginally covered in the first copyright law in 1710,<2> to fine art, art reproductions and performances of various kinds protected in the nineteenth century,<3> to sound recordings and machine-readable works of the present day. The purpose of copyright has always been to control the reproduction of created works, but the reason for providing such

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protection has changed over time.<4> The concept of copyright protection can be traced back to the sixteenth century.

Before William Caxton established his printing business in 1476<5> there was no need for copyright because the threat of widespread reproduction of another work was unlikely. Copying by hand was tedious and time-consuming. Like the printing industry, copyright protection began in England in the sixteenth century with the presumed need to regulate the printing trade to control the spread of heretical and seditious ideas.<6> This regulation was achieved both by having the books to be printed licensed with an ecclesiastical body and by licensing only certain presses, usually those of the Stationers' Company, one of England's major guilds.<7>

In the seventeenth century, political thought, revolution, and civil war ended this rigorous censorship and piracy flourished until about 1710 when the first modern English copyright law, the Statute of Anne, was passed.<8>

The Statute of Anne contained the first provision for protection favoring the author rather than the printer, the church, or the state.<9> DONALDSON v. BECKET (1774), a precedent-setting case which declared that copyright was subject to statutory rather than common law,<10> made further refinements in the law which was subsequently plagiarized<11> by the writers of the United States Constitution. Copyright then remained essentially unchanged until the Copyright Act of 1976.<12>

Most of the law in the United States is derived from English common law and the area of copyright law is no exception. According to Indiana University law professor Maurice J.

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Holland,<13> little is known of colonial copyright law,<14> but the framers of the Constitution included vague laws to protect authors and promote the arts and sciences.<15> Copyright legislation expanded in the ninteenth century protecting:

Prints	1802
Musical composition	1831
Dramatic composition in performance	1856
Photographs	1865
Fine art	1870
Translations	1870
Non-dramatic literary work	1870
Musical composition in performance	1897<16>

There were two other noteworthy developments in U. S. copyright protection during the nineteenth century. One, in 1831, extended the duration of copyright from fourteen to twenty-eight years while maintaining the fourteen-year-renewal period.<17> The other development involved a provision for the protection of foreign authors. This action, called the Chace Act (1891), afforded the same protection to foreign authors that domestic authors received.<18> Ironically, the real protection went to the U. S. authors whose works were largely being ignored by publishers naturally preferring the royalty-free work of English and other foreign authors.<19>

The Copyright Act of 1909 again extended the duration of copyright by increasing the renewal period to twenty-eight years,<20> but 1976 brought the first real change in copyright legislation since the days of Queen Anne.<21>

The 1976 Copyright Act completely redefined copyright by specifying the rights of the author more carefully than had been

done in previous legislation.<22> The rights of copyright were clearly stipulated as the rights to "1. reproduce the work; 2. prepare derivative works based upon it; 3. distribute the work to the public; 4. perform the work publicly; and 5. display the work publicly." The "author" in copyright is defined broadly as "the creator of a work...even though he or she may, in ordinary conversation, be called, say, an artist or a composer."<23>

This copyright law became longer, more detailed, and more specific than any of its predecessors, leaving less room for judicial interpretation than former copyright laws.<24> Also, duration of copyright was lengthened again to include the author's life plus fifty years for new copyrights, or, for existing copyrights of twenty-eight years, one forty-seven year extension for a total of seventy-five years.<25> Finally, copyright became transferable.<26>

Other content modifications included the preemption of all state common law copyright of unpublished work which placed copyright firmly in the domain of federal statutory law; simplification of procedures for obtaining copyright to encourage authors to register their work; provision for library and other educational photocopying; and the inclusion in copyright coverage of the broad array of mechanical and electronic media that reflected the technology of the day.<27>

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III. COMPUTER SOFTWARE AND PROGRAMS

The year 1976 also saw the marketing of the first microcomputer.<28> Even before the microcomputer, the question of protection of computer elements had arisen. Legal protection of computer programs is essential to the individual entrepreneur for the encouragement of creative endeavor<29> and has its historical precedent in the underlying intent of copyright since the Statute of Anne. Furthermore, the Congress that enacted the 1976 Copyright Act clearly intended that computer software and programs be protected;<30> however, the application of this intent was nebulous.

A large part of the problem stemmed from the basic question of whether copyright protection was actually more applicable to computer programs than protection by patent law or protection through the trade secret law.<31> A patent is granted to one who discovers, invents or significantly improves a substance, product, machine, process, or method; whereas, a trade secret is a device, formula, pattern, or combination of these, which gives its creator benefits over a competitor.<32>

To understand this dilemma, however, a few highly simplified definitions are in order: (1) A program is a set of instructions that, fed to the computer, produces a certain result;<33> (2) Software (and also firmware) is the place in which the program is usually stored<34> on tapes, disks,<35> or cassettes; (3) The program can be expressed in several ways, one of which is

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object code, which is incomprehensible to most people.<36> Stated another way, the program (instructions to the computer) is stored in software and can be expressed in object code.

To help clarify the issue of copyrightability, the National Commission of New Technological Uses of Copyrighted Works (CONTU) was formed in 1974.<37> This commission's work resulted in the Computer Software Copyright Act of 1980 that amended the 1976 act.<38> Part of the act stated that it is not an infringement to copy a program if the copy "is created as an essential step in the utilization of the computer program"<39> or if the copy is made for archival purposes.<40> This issue was addressed in the fair use segment of the 1976 Copyright Act. The issue of copyright protection versus protection by patent or trade secret law was resolved in the courts.

In 1980, the case DATA CASH SYSTEMS, INC. v. JS&A GROUP, INC. (480 F.Supp. 1063) was heard. This case involved Data Cash Systems' game COMPUCHESS, the program for which was encoded on firmware.<41> On the presumption that the program could not be unloaded (decoded), Data Cash Systems did not attempt to protect it. However, JS&A Group was able to unload and copy the program and thus marketed a similiar game. Data Cash Systems sued unsuccessfully.<42>

The basis for the decision in favor of JS&A Group was the case of WHITE-SMITH MUSIC COMPANY v. APOLLO COMPANY of 1908 (209 U. S. 1) in which Apollo reproduced on a piano roll music from a piece of sheet music published by White-Smith. The court ruled in favor of Apollo stating that the piano roll was not intended to be

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read by human beings.<43> In the case of DATA CASH SYSTEMS v. JS&A GROUP, INC., the court ruled that, like the piano roll, the object code was not intended to be read by human beings.

On appeal, the COMPUCHESS case was dismissed, but the rationale was changed. The judge determined that Data Cash Systems gave up its right to protection by not obtaining a copyright.<44>

Other cases followed involving one computer company suing another for copying and marketing similar programs. After APPLE COMPANY v. FORMULA INTERNATIONAL, INC. (562 F.Supp. 775) and TANDY CORP. v. PERSONAL MICRO COMPUTERS, INC. (524 F.Supp. 171, 173), the courts, relying heavily on the groundwork laid by CONTU, decided that computer programs, regardless of where they were stored or how they were expressed, were authored works and thus entitled to copyright protection.<45>.

IV. SOUND RECORDINGS

The case of WHITE-SMITH v. APOLLO COMPANY (209 U. S. 1) was also the precedent for early legislation regarding sound recordings,<46> a phrase defined in copyright as "a work that results from the fixation of a series of sounds (but not including the sounds accompanying a motion picture or other audiovisual work). Material objects in which the sounds are fixed are termed 'phonorecords' (even if they happen to be audiotapes)."<47> In simpler terms, sound recordings are records or tapes.

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Musical compositions, as mentioned earlier, came under the protection of copyright in 1831.<48> The form of the composition at the time was sheet music and the protection was afforded to the composer (author)<49> for the encouragement of the arts.<50>

In 1877, Thomas Edison invented the phonograph,<51> which reproduced in sound the work of the composer; however, nearly one hundred years passed before sound recordings were copyrighted.<52> The reason for the delay was the precedent established by the WHITE-SMITH v. APOLLO decision in 1908. Copyright of sound recordings, the actual disk or tape, was enacted in 1971 by Congress through an amendment to the Copyright Act of 1909.<53>

Previous to, and also subsequent to, the 1971 amendment to the Copyright Act of 1909, licensure protected the composer against the unauthorized reproduction and distribution of musical compositions as sound recordings. This licensure was enacted in the Copyright Act of 1909<54> and differs from the licensure required for public performance. The former licensure is required by those who actually produce the sound recording whereas the latter licensure is required by the entities which reproduce the sound recording, such as radio stations.<55>

Licensure for performance of musical composition dates back to 1897<56> and was also revised in the 1909 Copyright Act. However, by 1914, performance permission had become self-defeating because it imposed more hardship upon the individual composers than was justified for the protection offered.<57> To overcome these

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hardships, leading composers formed a few performing rights societies to hold blanket licenses for musical performances. The scope and power of these societies increased with burgeoning technology, and led to questions of anti-trust violations which are still unresolved.<58> The sound recordings themselves are covered under another copyright.

V. FAIR USE

There is an exception to the rule that copyright enjoins one person from making copies of the works of another. The exception is called fair use.<59> There is no simple definition of fair use, but it is generally considered to be unauthorized use of copyrighted material<60> which does not constitute infringement because: (1) it does not affect the market for the copyrighted material; (2) it promotes learning; and (3) it does not financially injure the copyright holder to any great extent.<61> Stated another way, under fair use "the unauthorized uses of a copyrighted work do not violate the copyright laws because the user's interest in the work outweighs the owner's interest in controlling access to it."<62>

The concept of fair use dates back to early nineteenth century British law, was first invoked in Great Britian in 1869, and was included in the Copyright Act of 1909.<63> Because fair use was a cloudy issue, it was strongly suggested that the question of fair

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use not be specifically addressed in the 1976 Copyright Act. The suggestion was ignored and fair use was written into the act.<64>

In the case of computer programs and software, it is fair use that allows a copy of a program to be made in the use of the program and for archival purposes.<65> With sound recordings, fair use applies to some forms of re-recording, for example, that by teachers for classroom use,<66> or that by libraries for preservation and use only if the original sound recording, owned by the library, is lost or damaged, and a replacement cannot be obtained at reasonable cost.<67>

VI. VIDEORECORDINGS

The doctrine of fair use was at the very heart of the controversy surrounding the copyright of videorecordings. Developed in the late 1960's and made available for home use in the 1970's,<68> videorecordings are magnetic tapes on which both sound and picture are recorded.<69>

There are two major cases which display the controversy in regard to videorecording and copyright. The first was heard in the District Court of the Western District of New York in 1982 and involved videorecording for educational purposes. In ENCYCLOPAEDIA BRITANNICA EDUCATIONAL CORPORATION v. CROOKS (542 F. Supp. 1156), the defendant, representing the Erie County District school board, methodically recorded a series of productions by Encyclopaedia

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Britannica Educational Corporation as they were shown on public television for classroom use in the Erie District schools.<70> The defense maintained that the purpose, which was strictly educational, was justified by fair use, and that the economic harm to the corporation was minimal. The court ruled that, because the plaintiff's market was limited to the educational community, the reproduction and distribution of the videorecordings did affect the business' profit and so was not fair use.<71>

A related and more widely known case is that of UNIVERSAL CITY STUDIOS, INC. v. SONY CORPORATION OF AMERICA (457 U. S. 1116 et al). In this case, Universal and Walt Disney sought an injunction and financial damages against Sony and others who were producing a variety of home videorecording devices, among them, BETAMAX.<72> The Ninth Circuit Court of Appeals ruled that "home videorecording of copyrighted works broadcast over the public airwaves for private noncommercial use constitutes copyright infringement."<73>

In January, 1984, the United States Supreme Court overturned the UNIVERSAL CITY STUDIOS, INC. v. SONY CORPORATION OF AMERICA ruling by a five to four vote stating that private copying of television programs for the purpose of shifting the time of the program constitutes fair use.<74> Justice John Paul Stevens further stated that sale of copying equipment did not constitute infringement, and that, because the laws in this area were unclear at best, it was necessary to "...be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests."<75> Dissenting justices

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invoked the basic rights of authors' control over their works.<76>

VII. CONCLUSION

There is an old story, probably fictitious, that the Irish missionary, Saint Columba, spent many nights copying the psalter of one Abbot Finnian. When it was complete, the abbot wanted the copy, but the saint refused to part with it. In 567 A. D., King Diarmid decreed that the copy go to the abbot saying "to every cow, her calf, and accordingly to every book its copy."<77> Throughout history, law in a democracy has evolved to meet the needs of the society it serves and so it is with copyright law. Despite its many changes, the basis for copyright legislation in the United States has remained the same since the founding fathers plagiarized the Statute of Anne: protection of the author or creator for the common good.

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HISTORY OF COPYRIGHT OF SELECTED NON-PRINT MATERIAL

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